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GUIDE TO THE
CONFLICT OF INTEREST LAW
FOR MUNICIPAL EMPLOYEES
CHAPTER 268A

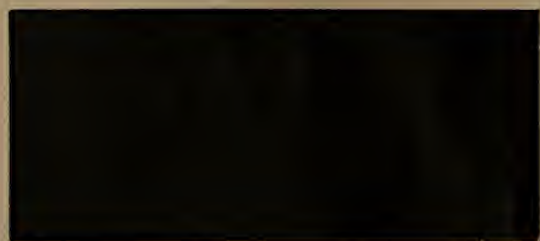
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GUIDE TO THE
CONFLICT OF INTEREST LAW
FOR MUNICIPAL EMPLOYEES
CHAPTER 268A

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PREFACE

The conflict of interest law, General Laws Chapter 268A, was enacted in 1962; from that time until 1978, the responsibility for its enforcement and interpretation rested with the Attorney General. In 1978, the Legislature created the State Ethics Commission to administer Chapter 268A and the new financial disclosure law (Chapter 268B). The Commission now serves as the primary agency charged with civil enforcement of the conflict statute.

In 1982 the Commission, in light of its experience interpreting and enforcing the conflict law, submitted legislative proposals to clarify, refine and update the 20 year- old statute. Most of the Commission's major proposals were adopted, effective March 29, 1983.

The Commission has prepared this Guide to provide a general introduction to and explanation of Chapter 268A for municipal officials and employees. (A Guide to the conflict law for state employees is also available from the Commission.) Both Guides are intended to assist public employees in understanding the scope of, and reasons for, the law so that they may conform their conduct to it.

In its approach and discussion, this Guide is necessarily general. Illustrative examples are provided to clarify certain provisions of the conflict law, but the Guide does not -- and could not hope to -- deal with every question that municipal employees may raise about the conflict statute and its application to them. This Guide is not meant to serve as formal advice. Municipal employees should not presume that after reading it they can resolve on their own all conflict of interest problems they may have. With respect to any particular situation, municipal employees may request from the corporation counsel, town counsel or city solicitor, an advisory opinion regarding their responsibilities under the law. (See Appendix A for further information regarding how to obtain an advisory opinion.)

A WORD OF CAUTION. THIS GUIDE REVIEWS CHAPTER 268A AS IN EFFECT ON APRIL 1, 1983. PUBLIC EMPLOYEES SHOULD WATCH FOR ANY AMENDMENTS TO THAT LAW THAT MAY AFFECT THEM. THE STATE ETHICS COMMISSION PERIODICALLY PUBLISHES A BULLETIN WHICH WILL REPORT SUCH CHANGES.

INTRODUCTION TO THE CONFLICT LAW

PURPOSE

Elected and appointed public employees are entrusted with the safety, welfare and well-being of the Commonwealth and its citizens. In return for this public trust, citizens are entitled to expect that public employees' private interests will not conflict with their public obligations. Accordingly, the conflict of interest law prohibits public employees from engaging in conduct which might be contrary to the best interests of the general public. To accomplish this, the law is broadly written to prevent conduct which gives rise to even the potential or appearance of conflict. In Massachusetts, as in 40 other states and the federal government, conflict laws are not only concerned with dishonesty and corruption, but also attempt, as the United States Supreme Court has noted, "to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into . . . relationships which are fraught with temptation."

STRUCTURE

The conflict of interest law has 30 sections. However, a great deal of duplication exists because many of the prohibitions are repeated for each level of government (state, county and municipal). After a section (Section 1) containing definitions, the municipal provisions of the conflict law break down as indicated in the following chart.

SECTION APPLICABLE TO MUNICIPAL EMPLOYEES	CORRESPONDING SECTION FOR EMPLOYEES OF		CRIMINAL PENALTY FINE/IMPRISONMENT	CIVIL PENALTY
	STATE	COUNTY		
\$2 (Bribery)	same	same	\$5,000/3 years	} \$2,000 for all sections
\$3 (Gifts)	same	same	\$3,000/2 years	
\$17 (Other Compensation)	\$4	\$11	\$3,000/2 years	
\$18 (Former Employees)	\$5	\$12	\$3,000/2 years	
\$19 (Financial Interest)	\$6	\$13	\$3,000/2 years	
\$20 (Contracts)	\$7	\$14	\$3,000/2 years	
\$21 (Civil Remedies)	\$9	\$15	---	
\$21A (Appointments by Boards)	\$8A	\$15A	---	
\$22 (Advisory Opinions)	\$10	same	---	
\$23 (Standards of Conduct)	same	same	---	

Completing the statute are sections dealing with the purchase of insurance for public building projects (Section 8), undated resignations (Section 21B), specific restrictions on the future employment of trustees of public institutions of higher education (Section 23A), and suspension of persons under indictment (Section 25).

Throughout this Guide, the provisions of the statute which apply to municipal employees are discussed. (The law's application to state employees is reviewed in the Commission's other publication, Guide to the Conflict of Interest Law.)

COVERAGE

Chapter 268A governs the conduct of public officials and employees (referred to collectively in the law as "employees") at the state, county and municipal levels of government. The term "employee" at each level is defined very expansively. You are considered an employee of a particular level of government if you perform services for it or hold any office, position, employment or membership in any of its agencies. It does not matter whether you are paid or unpaid or whether you work full-time or part-time. People who work on an intermittent basis or as consultants are also covered. For example, unpaid members of local boards or commissions are municipal employees as may be private citizens serving on a special advisory committee appointed by the mayor or Board of Selectmen to make recommendations on a specific issue. However, elected members of a town meeting and members of a local charter commission are explicitly excluded from the definition of municipal employee.

The law distinguishes two categories of municipal employees: regular and special. The distinction is important because two sections of the law apply in a less restrictive fashion to special employees.

The conflict law authorizes the board of selectmen, board of aldermen or city council to designate which of the municipality's positions are filled by special employees. You are eligible to be designated as a special municipal employee provided that:

- o you are not paid; or
- o you hold a part-time position which allows you to engage in other employment during normal working hours; or
- o you were not paid by the municipality for more than 800 hours during the preceeding 365 days.

However, under no conditions may a mayor, alderman, a city councillor, or a selectman in a town with a population of more than 5,000 be so designated.

All employees who hold equivalent offices or positions of employment in the same municipal agency must have the same classification. For instance, if one member of a school committee is classified as a special, all members should be so classified. In towns of 5,000 or less, selectmen may designate themselves as special employees.

AGENCIES

The governmental entities or agencies covered by Chapter 268A are also broadly defined. For the purposes of the statute, all departments, offices, councils, divisions, boards, bureaus, commissions, institutions, tribunals or other instrumentalities of city or town government are considered to be municipal agencies. In other words, all entities established by the community, such as the council on aging, the historical commission, the licensing board and the housing authority, are municipal agencies under the conflict law.

REGIONAL ORGANIZATIONS

The status of regional bodies such as regional school districts is not clearly defined in Chapter 268A. However, the State Ethics Commission has ruled that a regional school district is a "municipal agency" for purposes of that Chapter. The Commission determined that because of its autonomy of operation a regional school district is considered an independent municipal agency and not a subdivision or instrumentality of any or all of the member towns. Thus a contract with a regional school district is not considered to be a contract with any municipality. Not all regional bodies are municipal agencies, however. Some, such as regional transit authorities or regional mental health centers, may be funded by the Commonwealth and thus be state agencies.

ENFORCEMENT

The State Ethics Commission is the primary civil enforcement agency for violations of the conflict of interest law. The Commission is authorized to investigate and adjudicate alleged violations by state, county or municipal employees. Upon finding that a violation has occurred, the Commission may impose civil penalties including fines of up to \$2,000 per violation. In addition, the Commission may bring a civil action against any person who has acted to his economic advantage in violation of the law, and may recover on behalf of the Commonwealth, a county or a municipality, damages in the amount of the economic advantage or \$500, whichever is greater. In certain circumstances, the Commission may also recover multiple damages. Further, any violation which has substantially influenced an action taken by a state, county or municipal agency is grounds to avoid, rescind or cancel that action.

In addition, the prohibitions of the law, with the exception of the Standards of Conduct set out in Section 23, all carry criminal penalties including fines and terms of imprisonment (see chart above). Criminal prosecutions under the law remain the responsibility of the Attorney General and District Attorneys throughout the Commonwealth.

on it. Grateful for this resolution of the matter, the restaurant owner invites the investigator and his family to a free dinner at his restaurant. By so doing, the owner violates Section 3. If the investigator accepts the invitation, he also violates Section 3. If the same investigator had asked for the free dinner from the restaurant owner before making a decision as to the merits of the complaint and in return for agreeing not to act on it, he would have violated Section 2.

Example: A municipal purchasing agent awards several city office supply contracts to a stationery supplier who submits the lowest bids. At the end of the year, the general manager of the stationery firm offers the purchasing agent a set of luggage as a token of goodwill. The purchasing agent violates Section 3 if he accepts the gift. The supplier violates Section 3 simply by making the offer of luggage to the purchasing agent.

B. RESTRICTIONS ON OUTSIDE ACTIVITY (Section 17)

1. General Application

Section 17 limits the activity a municipal employee may engage in for someone other than the city or town for which he works; in other words, what he may do "on the side." The section reflects the maxim that a person cannot serve two masters. Whenever an employee works for private interests in matters in which the city or town also has an interest, there is a potential for divided loyalties, influence peddling, the use of insider information and favoritism -- all at the expense of the municipality. To avoid such problems, Section 17 is broadly written to prohibit any municipal employee, except in the proper discharge of official duties, from receiving or requesting compensation from, or acting as agent or attorney for, anyone other than the city or town or a municipal agency in relation to any "particular matter" in which the city or town is a party or has a "direct and substantial interest."*

With respect to this section, you should note at the outset the following:

- o The prohibition applies as long as some municipal agency has a direct and substantial interest in the matter; it does not matter whether your own agency has the interest.

*Section 17 also prohibits anyone from giving, promising or offering such compensation to a municipal employee.

- o "Anyone other than the city or town or a municipal agency" includes private individuals or organizations, as well as other levels of government (state, county or federal).
- o Compensation includes not only money but also anything of value received for services rendered. For example, the opportunity to participate in an investment scheme qualifies as compensation as would various fringe benefits. Reimbursements for expenses are not compensation.

Not all outside activity is prohibited, but only outside activity which relates to particular matters of direct and substantial interest to the city or town. First, there must be a particular matter which is defined as

any judicial or other proceeding, application, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

This definition focuses on types of activity which involve making decisions and exercising judgment. It covers specific decisions, projects, proceedings, and the like, rather than general issues or subject areas. For example, a town's appropriation to train police in cardio-pulmonary resuscitation (CPR) is a particular matter. However, the general subject of CPR training is not. And, if the appropriation is renewed the year after its original award, that second appropriation is a new particular matter, distinct from the original one. While the enactment of general legislation is not included in the definition of particular matter, the term does cover enactment of special legislation. Special laws are those directed at a specific situation or individual or entity -- for example, a law exempting a specifically identified parcel of land from local zoning restrictions. General laws, in contrast, usually establish a rule of future conduct applicable on a wider scale and apply uniformly to all individuals similarly situated.

Second, the particular matter must be of direct and substantial interest to the city or town, such as:

- o All particular matters which bring the financial interests of the city or town into play -- for example, all contracts and grants to which the municipality is a party, and determinations of local (e.g., property, excise) tax liability;

- o Any regulatory or adjudicatory proceeding or decision pending in any municipal agency, such as licensing, zoning, eminent domain or assessment proceedings;
- o Civil litigation involving the city or town or a municipal agency as a party (but not a lawsuit between two private parties where the city or town is not involved even though that lawsuit is pending in a municipal court and not criminal prosecutions);
- o Decisions about the use of municipal property and funds.

As stated above, your own agency need not be involved in the particular matter.

Example: A full-time city engineer cannot be paid by a private developer to help prepare plans and drawings for a proposed private development which will be presented to the city's planning board for approval. Although the engineer does not work for the planning board, Section 17 would prevent him from performing such services, even on his own time, because the action of the planning board is of direct and substantial interest to the city.

Finally, you should note that when you act as agent or attorney for someone other than the city or town in connection with a particular matter of direct and substantial interest to the city or town, you violate Section 17 even if you are not paid for your services. Neither "agent" nor "attorney" is defined in Chapter 268A. The term "attorney" is relatively clear; it basically applies to lawyers but may also include any person exercising a power of attorney. The term "agent" is much broader than attorney and refers to anybody acting in a representative capacity on behalf of someone else, regardless of whether the employee is a lawyer.

Example: A municipal employee serves in his off-duty hours as a trustee of a church in his town. The church and the town are negotiating a land exchange. If he represents the church in discussions with the town on this matter, he is acting as agent for the church, in connection with a particular matter (the land exchange) of direct and substantial interest to the town.

Example: When the same municipal employee participates in meetings of the church's board of trustees, he is not acting as the church's agent within the meaning of Chapter 268A; such participation does not constitute acting in a representative capacity on

behalf of the church in relation to a particular matter of direct and substantial interest to the town or a municipal agency.

2. Application to Special Municipal Employees

As noted earlier in this Guide, the conflict of interest law imposes fewer restrictions on special municipal employees because they have more limited contact with municipal government. Accordingly, Section 17 applies to special municipal employees only when there is a connection between the special municipal employee's outside activity and his or her work for the city or town.

A special municipal employee is prohibited from receiving compensation from, or acting as an agent or attorney for, someone other than the city or town only if the particular matter involved is one:

- a) in which he or she participated at any time as a municipal employee or special municipal employee;
- b) which is or has been within the preceding year the subject of the employee's official responsibility; or
- c) which is pending in the municipal agency in which the employee is serving (if he or she serves more than 60 days in any 365-day period).

If any one of these three conditions is met, then the prohibitions of Section 17 will apply to the special employee just as they do to the regular employee. A point should be made about each condition:

- o "Participate" means to participate "personally and substantially through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise."
- o An employee will have "official responsibility" over a matter if he or she has "direct administrative or operating authority. . . to approve, disapprove or otherwise direct agency action." The authority need not be final; it may be exercised with others or through subordinates. Many special municipal employees, including most consultants, have responsibility over only the specific project for which they were hired. On the other hand, members of boards or commissions

are often special municipal employees but will normally have "official responsibility" for every matter which is pending in their agency.

- o The prohibition with respect to matters pending in the special municipal employee's agency applies only if he or she serves in the agency more than 60 days in any 365-day period. To serve more than 60 days means to perform work on more than 60 days. Moreover, work on any part of a day will be considered work for one full day. The employee is responsible for keeping accurate records in this regard.

Example: A private computer programmer is hired as a part-time consultant by a city's assessing department to program a data system for property tax bills. A private company bidding on a computer contract with the city's personnel office asks the programmer to work on the contract bid. Because the programmer was hired by the city on a part-time basis, she has been designated a special municipal employee by the city council. Therefore, she is not prohibited from performing services for the private company bidding on the personnel contract, since that second contract is not a particular matter she participates in or has official responsibility for as a special municipal employee, and is not pending in the department where she works.

Example: A lawyer consults with a municipal board of health (BOH) for 45 days spread out over a year. His work relates exclusively to the BOH lead-paint program. The lawyer could represent a community health center in a funding application before BOH during that year, so long as his consulting work for that board does not relate to funding decisions, since he serves as a special municipal employee in BOH for less than 60 days during a year.

3. Exemptions

You will not violate Section 17 if you act in the proper discharge of your official municipal duties. For example, if a statute requires a municipal employee to represent interests other than the municipality's, it would not violate Section 17 for the employee to do so. But such an occurrence will be rare.

Also, Section 17 lists four particular actions which are exempt from the prohibitions of that section. As a result of these exemptions you may:

- a) provide unpaid assistance to someone who is subject to employment, discipline or other personnel proceedings in relation to those proceedings;
- b) act as a paid or unpaid agent or attorney for members of your immediate family or any person for whom you serve as a guardian, executor, administrator or other fiduciary, so long as you did not participate in, and do not have responsibility over, the matter involved and so long as your appointing authority approves;
- c) as a present or former special municipal employee, assist another person for compensation in working on a municipal contract, so long as the head of your agency certifies in writing that "the interest of the city or town requires such aid or assistance," and this certification has been filed with the clerk of the city or town;
- d) give testimony under oath or sworn statements.

C. FORMER MUNICIPAL EMPLOYEES AND PARTNERS OF PRESENT
AND FORMER MUNICIPAL EMPLOYEES (Section 18)

This section covers municipal employees who have left municipal service and the partners of both present and former municipal employees; these prohibitions apply equally to special municipal employees and their partners. The purpose of Section 18 is to insure that former municipal employees do not use their past friendships and associations within government or use confidential information obtained while serving the government to derive unfair advantage for themselves or others. It is not designed to prohibit former municipal employees from utilizing the general expertise which they developed while municipal employees, but instead is directed towards individual projects, decisions, or other "particular matters" in which they actually participated or over which they had official responsibility as municipal employees.

The provisions which apply to partners are designed to prevent the municipal employee from indirectly benefiting from matters which are or were within his official responsibility. They also prevent partners from deriving an unfair advantage as a result of their association with a present or former municipal employee.

1. Former Municipal Employees

Section 18(a) prevents former municipal employee from acting as agents or attorneys for, or receiving compensation directly or indirectly from, anyone other than the municipality by which they were employed in connection with any particular matter in which the municipality is a party or has a direct and substantial interest and in which they participated as municipal employees. Thus, if you actually participated in a particular matter as a municipal employee you can never become involved in that same particular matter after you leave municipal service except on behalf of the municipality.

Example: A member of the town zoning board of appeals votes to deny a special zoning permit to a person who wants to open a convenience store in an area zoned for residential use. The board member is also an attorney and, after his term on the board expires, he is asked to represent the prospective store owner in a suit against the board challenging its permit denial. Because he participated as a board member in the permit denial, he is precluded by §18(a) from representing the store owner in the lawsuit.

Example: The superintendent of a municipal public works department selects a contractor to do extensive sewer reconstruction and rehabilitation work in the town. Shortly afterward, he resigns his superintendent position and is hired by the contractor to act as foreman on the work to be done pursuant to the town sewer contract. Section 18(a) prohibits him from accepting this employment because he participated in the award of that contract while a municipal employee.

Section 18(b) turns on the authority formerly exercised by a municipal employee, as opposed to his or her actual participation in a matter. It prohibits a former municipal employee for one year after leaving municipal service from personally appearing before any municipal agency on behalf of someone other than the city or town in connection with a particular matter in which the municipality is a party or has a direct and substantial interest and which was within the employee's official responsibility as a municipal employee within the two-year period before he or she left municipal service. Note that this prohibition lasts for only one year, and restricts only appearances before municipal agencies. However, it does not matter whether you are paid for your appearance or whether you have actually worked on the matter yourself as a municipal employee. It is sufficient that the matter was within your official responsibility. As a general proposition, the more supervisory the position you hold, the more extensive your official responsibility will be even though you may actually participate in fewer particular matters.

Example: The chairman of a local liquor licensing board has official responsibility over all license applications submitted to the board. After leaving the board, he may not appear for one year on behalf of an applicant before the board on any case or proceeding that was pending before the board at any time during the last two years of his service. This prohibition exists even though the member personally took no action on the case. If he has taken some personal action, the permanent prohibition of Section 18(a) would apply.

Example: An employee of a city's building department is assigned by his supervisor to inspect a newly-constructed building for local building code violations. Section 18(a) will prohibit that employee from ever being paid by the building's owner in relation to that inspection, e.g., to perform remedial repairs. Although the supervisor does not personally make the inspection, Section 18(b) will prohibit her for one year after she leaves municipal service from appearing on behalf of the owner before a municipal agency in connection with the inspection.

2. Partners

Section 18(d) prohibits the partner of a current municipal employee from acting as agent or attorney for anyone other than the municipality in connection with a particular matter in which the municipality is a party or has a direct and substantial interest and in which the municipal employee has ever participated or over which he or she has official responsibility.

Example: A member of the planning board is a partner in a law firm. As a board member he has official responsibility for all applications for plan approval by developers. His partners cannot represent anyone other than the municipality before the board in connection with such an application. It will not matter that the board member himself has taken no action on a particular application or has disqualified himself from that proceeding.

Section 18(c) prohibits the partner of a former municipal employee for one year after the former municipal employee leaves municipal service from engaging in any activity in which the former municipal employee is himself prohibited from engaging by Section 18(a). In other words,

if a former municipal employee can never do something, his partner will not be able to do it for one year.

Example: When the planning board member's term expires, Section 18(a) will forever prohibit him from representing private clients in connection with appeals in which he participated as a board member. Section 18(c) will prohibit his partners for one year from providing such representation in connection with board proceedings in which the former board member participated.

"Partner" is an important but undefined term in Chapter 268A. To advance the purposes of the law, the term is not restricted to those who enter into formal partnership agreements. Rather, partner means any person who joins with the municipal employee or former municipal employee formally or informally in a common business venture. The substance of the relationship is what counts, not the term the parties use to describe that relationship. In addition, if a group creates the public appearance of a partnership (for example, by using joint stationery, business cards, and business listings), they will be treated as partners even though they may not, in fact, share profits.

Example: Three architects form a group called "Design Building Associates." They do not have a formal partnership agreement, but share common expenses and work together on some projects on which they divide the profits. The three architects will be treated as partners for purposes of Chapter 268A. Accordingly, if one of the architects is a former municipal employee, the other two will be prohibited by Section 18(c) for one year after the municipal employee/partner leaves municipal service from working on any project or other matter in which the former municipal employee participated as a municipal employee.

If a partner of a former municipal employee or of a special municipal employee is also a member of another partnership in which the former or special employee has no interest, the activities of the latter partnership are not subject to the provisions of Sections 18(c) and 18(d).

Example: A former member of the board of assessors is prohibited by Section 18(a) from being compensated by anyone other than the town in connection with any

assessment decisions in which he participated. The former board member is in a real estate partnership with a friend who is also a partner in a law firm. However, the former board member has no connection with the law firm. The law firm may represent a client challenging an assessment made by the former board member because the firm's activities are not subject to the restrictions of Section 18(c).

3. Former Town Counsel, City Solicitors or Corporation Counsel

Section 18 has specific provisions applicable to former town counsel, city solicitors and corporation counsel who were paid less than \$200 per year on a salaried or retainer basis. They may not appear personally before any municipal agency as agent for anyone other than the city or town only in connection with particular matters in which they participated. They are not subject to the Section 18(b) prohibition against personal appearances before municipal agencies in particular matters over which they only had official responsibility.

NOTE: ADDITIONAL PROHIBITIONS ON THE ACTIVITIES OF FORMER GOVERNMENT EMPLOYEES ARE CONTAINED IN SECTION 23. See page 25.

D. RESTRICTIONS ON OFFICIAL ACTIONS (Section 19)

1. General Application

Whereas Sections 17, 18 and 20 may limit your outside interests and activities, Section 19 restricts what you may do on your municipal job. It recognizes one of the most obvious principles of the conflict of interest law -- that public employees must not act in their official capacities in matters in which they have a personal financial stake. Section 19 also recognizes that the integrity of municipal employees can just as easily be compromised when they act on matters affecting the financial interests of other individuals or businesses with whom they are closely related. Section 19 does not prevent municipal employees from having private financial interests, but if they do, their actions as municipal employees may be restricted. Accordingly, except in limited situations (explained below), as a municipal employee (including a special municipal employee) you may not participate in a particular matter in

which the following people or entities have a financial interest:

- (a) you;
- (b) your "immediate family" which is defined as you, your spouse, and the parents, children, brothers and sisters of you and your spouse;
- (c) your partner;
- (d) a business organization in which you are serving as an officer, director, trustee, partner or employee; or
- (e) any person or organization with whom you are negotiating or have any arrangement concerning prospective employment.

Partner means a partner in any venture, even if totally unrelated to the matter in which the employee must act. For example, a municipal wiring inspector is a partner of Mr. X in a real estate development venture; the inspector cannot participate in the town's inspection of the wiring in Mr. X's restaurant even though the inspector has no interest whatsoever in the restaurant.

Business organization includes not only business organizations such as sole proprietorships, corporations, partnerships, and trusts, but also non-profit corporations, associations and other levels of government (state, county and federal).

Participate has been defined earlier in this Guide. For purposes of Section 19, it is important to remember that participate includes participation not only in a final decision but in any of the steps along the way as well. A municipal employee is not exempt from the provisions of Section 19 simply because he or she does not have the final decisionmaking responsibility over a particular matter. If the employee was involved in any substantial way in working on the matter at any stage of consideration, he or she probably "participated" in it. Furthermore, an employee can participate within the meaning of Chapter 268A even if his or her duties would not have required it. For example, if employees have personally and substantially interjected themselves into the making of a decision by their agency or by another agency (e.g., by recommending a course of action), they may well have participated in that decision even if they had no responsibility for participating in it.

2. Exemptions

a) Written Permission from Appointing Official

You may receive an exemption from the prohibitions of Section 19 from the official who appointed you to your job. To do so, you must first advise that official of the nature and circumstances of the particular matter in which you wish to participate and make full disclosure of the financial interest involved. If that official makes a written determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of your services, you may go ahead and participate in that matter. NOTE that this exemption is not available to elected municipal officials because they have no "appointing official."

Example: A local businessman has asked for a special zoning variance so that he may garage the trucks and heavy equipment from his contracting business in an area zoned for residential use only. The residence of one member of the Zoning Board of Appeals is adjacent to the lot which is the subject of the special permit application. Because of the effect such a permit would have on the value of the member's property, he has a financial interest in the decision to grant or deny it. As a result, Section 19 prohibits him from participating in that decision unless he receives a written exemption from his appointing official after making full disclosure of his financial interest in the decision.

Example: The board of aldermen in a city must give final approval before a major commercial development project may begin. One of the aldermen is a member of the board of directors of the corporation which will be the contractor on the project. As a director of a business organization with a financial interest in the board of aldermen's approval, this member is prohibited from participating in that decision by Section 19. Because she is elected, she has no appointing official. As a result, an exemption based on a written determination by that official that the financial interest involved is not substantial enough to affect her services as a municipal employee is unavailable to her.

b) Elected Official Making Demand Bank Deposits

Section 19 specifically exempts from its application an elected municipal official making demand bank deposits of municipal funds, if the elected official first files with

the clerk of the city or town a statement making full disclosure of the financial interest involved.

Example: The elected city treasurer is a member of the board of directors of a local bank. He opens and maintains a demand account in that bank with city money after filing a disclosure of his position on the board and the bank's interest in the deposit. He is not in violation of Section 19 because he has complied with the exemption.

c) Determinations of General Policy and Shared Financial Interests

Certain decisions made by municipal officials may affect not only their own financial interests, but also those of a great many others in a municipality. The decision to raise local water or sewer rates, for example, impacts financially not only on the water commissioner, but on all others in the town as well. To apply Section 19 strictly in this circumstance would severely hinder the operation of a municipality. Therefore, Section 19 does not apply if the particular matter at issue involves a determination of general policy and the interest of the municipal employee or members of his immediate family is shared with a substantial segment of the population of the municipality. For example, if a municipal employee is a homeowner, he would have a financial interest in every governmental decision that will affect local property tax rates. Yet his financial interest as a property taxpayer is shared by the majority of citizens and therefore does not qualify as a financial interest within the meaning of the conflict law. On the other hand, a municipal employee clearly has a financial interest in the award of a municipal contract to a corporation in which he or she is a stockholder.

E. FINANCIAL INTERESTS IN MUNICIPAL CONTRACTS (Section 20)

1. General Prohibition

Section 20 of Chapter 268A prohibits a municipal employee from having a direct or indirect financial interest in a contract made by a municipal agency. This section is intended to prevent municipal employees from using their positions to obtain contractual benefits from the city or town and to avoid any public perception that municipal employees have an "inside track" on such opportunities. In

Section 20 the term "contract" refers not only to a formal, written document setting forth the terms of two or more parties' agreement, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties under which each undertakes certain obligations in consideration of the promises made by the other(s) constitutes a contract. The word thus includes employment arrangements, contracts for the sale of goods, contracts to provide services, grants awarded by the city or town to individuals or corporations, contracts between a municipal agency and a state agency, construction contracts, consulting contracts, etc.

Example: A full-time employee of the school department owns a one-half interest in a business which provides transportation for the handicapped. The employee will violate Section 20 if his business enters into a contract with the school department to transport handicapped students to and from school.

Example: A full-time employee of a municipal police department cannot accept a part-time paid job as director of the town's civil defense office, which is a subdivision of the police department.

Example: A member of the board of assessors works for a small data processing firm. The town's assessing department has contracted with that firm to computerize the assessment records. While the board member could work for the firm, she would be prohibited under Section 20 from working on the assessment records project if she would be paid for her work out of the contract funds.

2. Application to Spouses

The fact that a spouse of a municipal employee has a financial interest in a municipal contract does not automatically place the municipal employee in violation of Section 20 since the spouse's financial interest is not necessarily attributed to the state employee. However, a municipal employee will not avoid the Section 20 prohibition merely by having the contract "technically" in a spouse's name.

Example: An employee of the police department is married to an automobile dealer. The spouse's dealership sells and leases cruisers to the police department. The spouse owns the dealership and

thus has a financial interest in the sale contracts and leases with the police department. However, the department employee does not have an indirect financial interest in the spouse's contracts and leases simply because she is married to the dealer. Only if the department employee were a partner or part-owner in the dealership or exercised control over the management of the partnership would she have a prohibited financial interest in the contracts and leases.

Example: An employee of the school department wants to contract to perform janitorial duties at a school after hours. He cannot have his wife sign the contract for janitorial services but then perform the services himself.

3. Exceptions

After setting out the flat prohibition, Section 20 goes on to list a number of exceptions. Some of these exceptions turn on the relationship between the agency the municipal employee regularly works for and the contracting agency; others turn on whether the employee qualifies as a "special municipal employee." As a general proposition, there will be very few instances when an employee will be able to contract with his own agency. However, there will be instances where an employee will be able to contract with other agencies as long as certain conditions (discussed below) are met.

a) The most far-reaching exception is that found in Section 20(b). It states that a municipal employee may have a financial interest in contracts made by a municipal agency if 1) he or she is not employed by and does not participate* in or have official responsibility* for any of the activities of the contracting agency or an agency which regulates the activities of the contracting agency; 2) the contract is made after public notice or competitive bidding; and 3) the municipal employee files with the clerk of the city or town a disclosure of his or her financial interest and those of immediate family members in the contract. If the contract is for personal services:

- o the services must be provided outside normal working hours;

* These terms are defined in G.L. c. 268A, §1.

- o they may not be required as part of his or her regular duties;
- o the municipal employee may not be compensated for those services for more than 500 hours in a calendar year;
- o the head of the contracting agency must file a written certification with the clerk of the city or town that no employee of the agency is available to perform those services as a part of his or her regular duties; and
- o the city council, board of selectmen or board of aldermen must approve the exemption of the interest from this section.

Example: A full-time employee of the public works department, who is part-owner of a family company which produced electrical equipment, may enter into a competitively bid contract with the school department to provide new lighting fixtures for a school annex, provided he makes the necessary disclosure to the town clerk. However, if he worked for the school department or, if the contract was not awarded after public notice or competitive bidding, he would be prohibited from having such a contract.

Example: A full-time attorney in the civil service commission may enter into a contract with the licensing board to draft regulations provided he does the work on his own time (e.g., nights or weekends); he does not bill the board for more than 500 hours in any one calendar year; he makes the necessary disclosure to the city clerk; the board gives members of the general public the opportunity to seek the contract; the head of the board certifies that no one at the board is available to do the work; and the city council votes to exempt his interest in the contract from this section.

Example: A full-time employee of the police department owns 25 percent of the stock in a corporation which supplies automobile fuel. The employee will violate Section 20 if his corporation enters into a contract with the police department to sell it fuel for its cruisers.

b) Section 20 does not apply to a special municipal employee in the following circumstances:

(1) the special municipal employee does not participate in or have official responsibility for any of the activities of the contracting agency, and has filed with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract;

or

(2) the special municipal employee has filed with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract and the city council, board of selectmen or board of aldermen has approved the exemption of his interest from this section.

Example: An attorney who works part-time for the town's licensing board, and has been classified a special municipal employee, may also have a consulting contract with the school department to help with litigation, if she has filed with the town clerk a disclosure of her interest in the consulting contract.

c) Section 20 does not apply to a municipal employee who receives benefits from programs funded by the United States or any other source in connection with the improvement or rehabilitation of his residence to the extent permitted by the funding agency.

Example: A municipal employee who owns a home which qualifies for federal subsidies for home weatherization may obtain such a subsidy, even though the program is administered by, and the funds distributed by, a municipal agency of the same town in which she is employed.

d) Finally, Section 20 does not prohibit a municipal employee from serving as selectman in the same town as long as:

- o he does not vote or act as selectman on any matter which is within the purview of the agency by which he is employed or over which he has official responsibility;

- o he receives compensation for only one office or position in the town - individuals may choose which compensation they wish to receive;
- o he is not appointed to a municipal position while a member of the board of selectmen or for six months after leaving office. (However, a selectman may be routinely reappointed to a previously-held position.)

Example: A school teacher may be elected selectman as long as she does not vote or act on any matter which is within the purview of the school department, and receives only one salary. When her current teaching contract expires, she may be routinely reappointed to her teaching position while serving as a selectman. However, she may not be appointed to the position of principal while she is a selectman, or for six months after her term as selectman ends.

Similar to this provision, Section 4 provides that a state employee may hold an elective or appointive office in a city or town as long as he does not vote or act on any matter which is within the purview of the state agency by which he is employed or over which he has official responsibility.

IF YOU LEARN THAT YOU HAVE A FINANCIAL INTEREST IN A CONTRACT MADE BY A MUNICIPAL AGENCY, YOU MUST WITHIN 30 DAYS FULLY DISCLOSE YOUR FINANCIAL INTEREST TO THE AGENCY INVOLVED AND TERMINATE OR DISPOSE OF YOUR INTEREST OR OTHERWISE OBTAIN AN EXEMPTION.

F. PROHIBITED APPOINTMENTS OF BOARD AND COMMISSION MEMBERS (Section 21A)

Section 21A of the conflict law prohibits the members of a municipal board or commission from appointing one of their members to any office or position falling under the supervision of that board or commission. This prohibition continues for thirty days from the member's termination of service on the board or commission except in the case of selectmen. (A 1982 amendment to Section 20 requires that selectmen wait 6 months after leaving the board before appointment to any municipal position, whether or not the

position is under the direct supervision of the selectmen.) Section 21A does not apply to appointments or elections which have first been approved at the town's annual town meeting.

Section 21A must be read in conjunction with Section 19 of Chapter 268A. Under Section 19, a member of a board or commission would be prohibited from substantially participating in any discussion or plans to be appointed by the board to an office or position under the board's supervision if that new office or position would involve compensation, since the board member's financial interests would thereby be affected. Thus, even if a board member resigns from the board and waits the required time period before assuming a position, if the member substantially participated in discussions concerning his appointment to that position while still on the board, he would violate the conflict of interest law.

Example: A member of the board of assessors may not resign from the board, wait thirty days, and then be appointed by the board as the clerk in the assessor's office, if the member initiated or otherwise participated while serving on the board in discussions with other board members concerning such an appointment.

G. PROSPECTIVE MUNICIPAL APPOINTEES; DEMANDING
UNDATED RESIGNATIONS PROHIBITED (Section 21B)

Section 21B prohibits a mayor, city manager or town manager from requiring a prospective appointee to any position under his jurisdiction to submit an undated resignation as a prerequisite to appointment. This section of the conflict law prevents the chief executive officer of a municipality from dismissing an employee without the need for public explanation and from exerting the unfair leverage over an employee's performance which the possession of an undated resignation would afford.

H. STANDARDS OF CONDUCT (Section 23)

Section 23 of Chapter 268A sets forth additional prohibitions collectively referred to as the "Standards of Conduct." Since they articulate some of the most fundamental principles and prohibitions applicable to public employment, the Standards

serve essentially as a general code of ethics which supports and supplements the other provisions of the conflict of interest law. The Standards extend beyond single actions which constitute conflicts and address both courses of conduct raising conflict questions and appearances of conflicts. All five Standards apply to current public employees; two also apply to former public employees. The Standards do not provide for criminal penalties, but rather are to be interpreted and enforced by the State Ethics Commission and by constitutional officers and agency heads through appropriate civil and administrative action.

The Standards and the appropriate enforcement methods offer agency heads an opportunity to develop realistic, effective guidelines tailored to conflict situations unique to an agency's operations and which can address particular recurring situations or matters of concern.

The specific provisions of Section 23 state that no officer or employee of a state, county or municipal agency shall:

- 1) accept other employment which will impair his independence of judgment in the exercise of his official duties;
- 2) use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others; or
- 3) by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is unduly affected by the kinship, rank, position or influence of any party or person.

Further, no current or former officer or employee of a state, county or municipal agency shall:

- 1) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority; or
- 2) improperly disclose materials or data which are not considered public records and which are acquired by him in the course of his official duties nor use such information to further his personal interests.

As is the case with each provision of the conflict of interest law, application of the Standards of Conduct to a specific situation depends on the facts of that situation. Since these Standards supplement the other provisions of the law, conduct may violate Section 23 even though it is not specifically prohibited by any other provision of the statute. In other words, private employment or "second jobs" which do not violate Sections 17, 18 or 20 may violate Section 23; official actions which do not violate Sections 2, 3 or 19 may violate Section 23.

As a general rule, the Standards of Conduct may apply whenever there is an overlap or direct connection between the official duties and responsibilities of public employees or their agencies and their private activities, interests or relationships. Since this overlap of personal and public interests can at a minimum create an "appearance of impropriety," Section 23 may prohibit a particular employee or group of employees from engaging in a particular activity. Thus, these sections may prohibit a municipal employee from working "on the side" for a company which does business with, gets funds from, or is regulated by, the municipal agency by which he is employed. These sections may also prohibit a municipal employee from acting in his official capacity in matters affecting persons or entities with which he has a business or personal relationship.

The following examples highlight types of conduct which could violate the Standards so that you may be aware of the scope of their prohibitions.

Example: An employee of the public works department (PWD) enters into a consulting contract with a construction company which regularly seeks to obtain contracts with the PWD. Under the terms of the consulting contract the employee will provide engineering services on out-of-state construction projects. This outside employment would probably not violate Section 17(a) of Chapter 268A since the compensation would not be received in relation to municipal contracts. Moreover, if his duties as a public works employee do not require him to participate in awarding or monitoring public works contracts with this company, Section 19 would probably not apply. However, the director of public works in a Code of Conduct has determined that acceptance of such employment would violate Section 23 since outside employment of this type implicates both the Section 23 prohibition against acceptance of employment which will impair the public employee's independence of judgment in the exercise of official duties and the proscription against giving the appearance that any person can unduly enjoy a public employee's favor in the performance of official duties.

Example: A former employee of the town personnel office sets up her own employment business and uses confidential information from the personnel records which she inspected in her official capacity to prepare a client list for use in her private business. This would violate the prohibition of Section 23 against using confidential information acquired in the course of official duties to further personal interests.

Example: A city employee submits a request for reimbursement for travel expenses purportedly incurred in attending a conference. The employee did, in fact, attend the conference, but did not incur the full expenses for which he seeks reimbursement. This conduct would violate, in addition to other laws of the Commonwealth, Section 23, since it constitutes an attempt to use an official position to secure unwarranted privileges.

Example: A local wiring inspector performs private electrical work in the same town which employs him. He fails to insure that electrical permits are issued in inspections conducted for his own private electrical work. Besides violating Section 19, this conduct violates Section 23 because it creates the impression that the inspector can be unduly influenced in the performance of his duties and because the inspector has secured an unwarranted privilege or exemption for himself.

Example: A planning board member who participates in the board's consideration of a subdivision plan submitted by a contractor who at the same time is building his house violates Section 23 since his actions create a reasonable basis for the impression that the contractor can unduly enjoy his favor in the performance of his official duties.

Example: A municipal employee responsible for analyzing and making recommendations on the awarding of contracts is offered a job by a company which is currently seeking a contract. The company may thereby violate Section 3. If the employee enters into negotiations or makes any arrangements concerning prospective employment, Section 19 will apply. However, even if he does not pursue the offer, it must be disclosed to the employee's superiors. By failing to make the disclosure and continuing to participate in the contracting process, the employee would create the impression that the private party could improperly influence his official actions in violation of Section 23.

APPENDIX A

HOW TO REQUEST A WRITTEN ADVISORY OPINION

Municipal employees are entitled to the opinion of their municipality's legal counsel (corporation counsel, city solicitor or town counsel) on any question concerning their duties, responsibilities and interests under the conflict of interest law. The following general procedure for requesting such an opinion is set out in §22 of Chapter 268A.

- o Requests by subordinate employees should be made in confidence to the chief officer of their municipal agency who will in turn request the opinion in confidence from the legal counsel.
- o Requests by constitutional officers and heads of municipal agencies should be made in confidence directly to the legal counsel.
- o Requests must include detailed facts which raise a question of actual or prospective violation of the conflict law.
- o Legal counsel must file the opinion in writing with the city or town clerk as a matter of public record.

The State Ethics Commission does not ordinarily render formal advisory opinions to municipal employees but instead directs them to their town counsel or city solicitor. From time to time an exception to this policy is made when the advice sought would be of general application to a number of cases throughout the Commonwealth.

APPENDIX B

HOW TO FILE A COMPLAINT

The State Ethics Commission may initiate a confidential inquiry into any alleged conflict of interest about which it has sufficient evidence. If you have reason to believe that a violation of the conflict of interest law has occurred or is occurring, you may call or visit the State Ethics Commission office at Room 1413, One Ashburton Place, Boston, (617) 727-0060, and speak with a member of the Commission's staff. The staff member will assist you in determining whether the situation or conduct which you have observed does in fact raise questions under the conflict law.

If, after discussing the matter with the Commission's representative, you wish to make out a sworn complaint, a form will be provided to you for that purpose. Referrals need not, however, be in the form of a sworn complaint.

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